

STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:)	Docket No. 00-AFC-14
)	
Application for Certification)	
of the EL SEGUNDO POWER)	STAFF'S ADDITIONAL
REDEVELOPMENT PROJECT)	PMPD COMMENTS
)	
_____)	

The California Energy Commission (CEC) Staff appreciates this opportunity to provide additional written comments concerning the Presiding Member's Proposed Decision (PMPD) in the El Segundo siting case, following the Committee hearing held on February 23, 2004. These additional comments will (1) highlight certain important points concerning the "Biological Resources" issue, and (2) clarify the record regarding certain stipulated Conditions of Certification that were inadvertently omitted from the PMPD.

I. THE "BIOLOGICAL RESOURCES" ISSUE

During the PMPD hearing, the Committee asked certain questions about the impact(s) of Staff's proposed "monthly" flow caps on energy production at the El Segundo facility. The following facts are undisputed:

A. Staff's Flow Caps Will Allow The New Facility To Operate At Full Capacity Anytime.

Under either the "zero" baseline cooling flows that now exist at Intake #1, or the historic baseline cooling flows that CEQA "normally" requires, the Applicant would be allowed to withdraw more than enough ocean water to operate the new facility at full capacity anytime it wishes to do so. Specifically, ocean water withdrawals allowed under Staff's proposed monthly caps would range from at least 239 million gallons per day (mgd) (in April under the "zero" baseline case) to as much as 477 mgd (in August under the "normal" historic baseline case). These volumes would provide far more cooling water than the Applicant itself claims is needed to run the proposed project at full capacity (i.e. 207 mgd) anytime the Applicant so desires, while still providing a large daily "surplus" of cooling water for the Applicant to run its far less efficient existing Units 3 and 4 as well. (See Staff's Opening Brief at pp. 21-22, and Staff's Evidentiary Exhibits #16 and #17).

B. The Flow Caps Can Be Relaxed In An Emergency Situation.

The “Verification” portion of **Staff’s BIO-1 Condition of Certification** provides that the monthly flow caps can be lifted by obtaining a variance from the Commission’s Compliance Project Manager (CPM) if an “emergency situation (e.g. energy crisis) arises.”

C. The Flow Caps Can Be Modified If Sound Science Shows They Are Unnecessary.

As is also provided in the “Verification” portion of **Staff’s BIO-1 Condition of Certification**, an amendment to the annual and monthly flow caps can be obtained from the Energy Commission based on a reliable entrainment/impingement study establishing that less stringent annual or monthly flow caps will avoid significant direct or cumulative marine resource impacts.

D. The Flow Cap Comments By Applicant’s Attorney Do Not Constitute Evidence.

During the PMPD hearing, the Applicant’s Attorney (Mr. John McKinsey) made a number of comments and assertions regarding the volume(s) of cooling water needed to operate the new units (5, 6 and 7) and the remaining older units (3 and 4) at the El Segundo site. These comments and assertions were not submitted during the evidentiary hearings, have never been subjected to cross-examination or rebuttal, and do not constitute evidence upon which the Committee/Commission can base its decision. Staff disagrees with these comments and assertions, and is prepared to address them through sworn testimony should the Committee decide to reopen the evidentiary record on this issue.

E. The Proper Baseline For This Case Is “Zero.”

At the PMPD hearing, Commissioner Keese asked Staff Counsel if the five year “historic” cooling water flows in existence at Intake #1 when the AFC was filed could constitute a lawful CEQA “baseline” in this case. Staff acknowledges that this would constitute the “normal” baseline under CEQA, but we conclude that the lawful CEQA baseline for cooling water flows in this case is “zero” (as reflected in Staff Exhibits #17 and #32) for the following reasons. First, the “zero” cooling flow for Intake #1 in these exhibits accurately reflect the physical conditions in existence at the site since January 1, 2003, when Units 1 and 2 legally ceased generating electricity because their air quality permits have expired. Second, no factual or legal basis for ignoring the “zero” baseline has been provided in the evidentiary record, so to do so would lack substantial evidence and would be arbitrary. Third, the “zero” baseline approach is consistent with both case law and the legal guidelines requiring that CEQA “be interpreted in such manner as to afford the *fullest possible protection* to the environment within the reasonable scope of the statutory language.” See, e.g., Title 14, California Code of Regulations, Section 15003. For these reasons, Staff continues to recommend that the Committee/Commission adopt the “zero” baseline cooling water flows for Intake #1, as reflected in Staff Exhibits #17 and #32.

II. STIPULATED CONDITIONS OF CERTIFICATION

The following Conditions of Certification were discussed during the February 23, 2004 PMPD hearing. Staff was instructed to research the stipulated Conditions regarding questions that were raised by various parties as to accuracy. The results are reported below.

AIR QUALITY

Condition of Certification **AQ-C5** was agreed to by the Applicant in present form on three occasions. It was first agreed to in the Written Rebuttal Testimony of El Segundo Power II LLC, dated February 10, 2003, page 3, the Transcript of February 20, 2004, page 6, line 22, and ESP II LLC Opening Brief, page 2, which refers to CEC Staff's Direct Written Testimony pages 16 to 19 that shows the Condition as presented in the PMPD Comments.

Condition of Certification **AQ-C9** had a typo that was corrected to reflect the CO limit of 2.0 PPMV that was stipulated to by the applicant in **AQ-C25**. The change to the 2.0 PPMV of CO was included in the Air Quality section of Staff's Direct Written Testimony of January 22, 2003, page 18, and confirmed by the Applicant in its Written Rebuttal Testimony of El Segundo Power II LLC, dated February 10, 2003, page 3 and ESP II LLC Opening Brief, page 2, Footnote 1.

Condition of Certification **AQ-C17** should not have been changed from 6.0 PPMV to 2.0 PPMV as the higher limit had been stipulated by the parties.

GENERAL CONDITIONS

Staff inadvertently left out the language that had been stipulated to by the parties in **CON-15**. The correct language was published in Staff's 2nd Prehearing Conference Statement and Related Schedule of January 3, 2004, page 2. The correct language is underlined and old wording is shown as strike-through.

CON-15

The following is the procedure for establishing and enforcing milestones, which include milestone dates for pre-construction and construction phases of the project.

Milestones, and method of verification must be established and agreed upon by the project owner and the CPM no later than 30 days after project approval, the date of docketing. If this deadline is not met, the CPM will establish the milestones.

I. ESTABLISH PRE-CONSTRUCTION AND CONSTRUCTION MILESTONES TO ENABLE COMPLETION OF CONSTRUCTION IN COMPLIANCE WITH SCAQMD'S 3 YEAR "START OF OPERATION" REQUIREMENTS, CURRENTLY CONTAINED IN RULE 1309.1

~~I. ESTABLISH PRE-CONSTRUCTION MILESTONES TO ENABLE START OF CONSTRUCTION WITHIN ONE YEAR OF CERTIFICATION~~

1. Obtain site control.
2. Obtain financing.
3. Develop a demolition schedule for power blocks 1 and 2.
4. Develop a demolition schedule for the tank farm.
5. Mobilize site.
6. Begin rough grading for permanent structures (start of construction).

~~II. ESTABLISH CONSTRUCTION MILESTONES FROM DATE OF START OF CONSTRUCTION~~

7. Begin pouring major foundation concrete.
8. Begin installation of major equipment.
9. Complete installation of major equipment.
10. Begin gas pipeline construction.
11. Complete gas pipeline interconnection.
12. Begin T-line construction.
13. Complete T-line interconnection.
14. Begin commercial operation.

The CPM will negotiate the above-cited pre-construction and construction milestones with the project owner based on an expected schedule of construction. The CPM may agree to modify the final milestones from those listed above at any time prior to or during construction if the project owner demonstrates good-cause for not meeting the originally-established milestones. Otherwise, failure to meet milestone dates without a finding of good cause is considered cause for possible forfeiture of certification or other penalties.

~~III. A FINDING THAT THERE IS GOOD CAUSE FOR FAILURE TO MEET MILESTONES WILL BE MADE IF ANY OF THE FOLLOWING CRITERIA ARE MET:~~

1. The change in any milestone does not change the established commercial operation date milestone.
2. The milestone is changed due to circumstances beyond the project owner's control.
3. The milestone will be missed, but the project owner demonstrates a good-faith effort to meet the project milestone.
4. The milestone is missed due to unforeseen natural disasters or acts of God which prevent timely completion of the milestones.

If a milestone date cannot be met, the CPM will make a determination whether the project owner has demonstrated good cause for failure to meet the milestone. If the determination is that good cause exists, the CPM will negotiate revised milestones.

If the project owner fails to meet one or more of the established milestones, and the CPM determines that good cause does not exist, the CPM will make a recommendation to the Executive Director. Upon receiving such recommendation, the Executive Director will take one of the following actions.

1. Conclude that good cause exists and direct that revised milestones be established; or
2. Issue a reprimand, impose a fine, or take other appropriate remedial action and direct that revised milestones be established; or
3. Recommend, after consulting with the Energy Facility Siting and Environmental Committee, that the Commission issue a finding that the project owner has forfeited the project's certification.

The project owner has the right to appeal a finding of no good cause, or any recommended remedial action, to the Energy Facility Siting and Environmental Committee, and to the full Commission.

LAND USE

Staff agrees with the City of Manhattan Beach comments relating to the wording of **LAND 5** and **LAND-9**.

NOISE

Staff agrees with the City of Manhattan Beach comments relating to the wording of **NOISE-8**.

VISUAL

Staff agrees with the City of Manhattan Beach comments relating to the wording of **VIS-2** and **VIS-5**

TRAFFIC AND TRANSPORTATION

Staff agrees with the City of El Segundo comments relating to the correct wording of **TRANS-5**.

III. CONCLUSIONS CONCERNING THE EI SEGUNDO PMPD.

The PMPD for the proposed El Segundo Repower Project needs to be revised regarding the “Biological Resources” topic to either (A) require each of the “fully mitigated” conditions consistent with Staff’s recommended “three-legged stool” option; or (B) require the Applicant to file an amended AFC proposing to implement the Hyperion Wastewater Cooling Alternative. (See these conditions in the “Biological Resources” section of the Appendix to Staff’s Initial PMPD Comments, dated February 17, 2004). In addition, the PMPD needs to be revised to properly include all of the various stipulated Conditions of Certification that were inadvertently omitted or modified.

Dated: March 1, 2004

Respectfully submitted,

DAVID F. ABELSON
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